Filed 1/16/09 P. v. Maynarich CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MARK RONALD MAYNARICH, Defendant and Appellant.	G040203 (Super. Ct. No. 07SF0875) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Luis A. Rodriguez, Judge. Affirmed.

Tony F. Farmani, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

* * *

FACTS AND PROCEDURAL BACKGROUND

A jury convicted defendant Mark Ronald Maynarich of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1); all further statutory references are to this code unless otherwise specified). Defendant was sentenced to two years in prison, with 332 days of credit awarded. Restitution and parole revocation fines of $200 each were imposed (§§ 1202.4, 1202.45). A $20 security fee and DNA testing were also ordered and the court retained jurisdiction of victim restitution.

Matthew Stanton testified that he arrived at a bar about 11:00 p.m. and sat right next to defendant; the victim, Sean Foster, sat on the other side of the bar from them. Shortly after Stanton arrived Foster beckoned to him, saying "hey come over here"; Stanton did not. Soon Foster made another gesture toward Stanton or defendant and said something that Stanton could not hear. Stanton testified that defendant finished his drink, walked up to Foster, and hit Foster with his glass in the face, after which Foster fell to the floor. Defendant then left the bar. Stanton had never seen defendant or Foster before the incident.

Foster had a lacerated face, a swollen eye, and a headache for two weeks. He testified he did not remember how he was injured or who hurt him. Additional facts are set out in the discussion.

After defendant appealed we appointed counsel to represent him. Counsel filed a brief setting forth the facts of the case and the disposition. He did not argue against defendant but advised the court he had not found any issues to present on defendant's behalf. (*People v. Wende* (1979) 25 Cal.3d 436.) He suggested seven issues to assist us in our independent review of the record, as set out below.

Defendant was given 30 days to file written argument on his own behalf. That period has passed and we have received no communication from him. We examined the entire record to determine if any arguable issues were present, including

those suggested by counsel, and found none. (*People v. Wende, supra*, 25 Cal.3d at pp. 441-442; *People v. Johnson* (1981) 123 Cal.App.3d 106, 111-112.)

DISCUSSION

1. Admission of Enlarged Photo of Victim's Injuries

Defendant moved to exclude a blown-up, color photo of the facial injury to the victim on the grounds it would inflame, prejudice and confuse the jury, it was irrelevant because there was no bodily injury allegation, and it was cumulative.

The trial court has broad discretion about whether to or exclude graphic photographs on the grounds of relevance and undue prejudice. (*People v. Bonilla* (2007) 41 Cal.4th 313, 353-354.) Admission here was proper. It showed details of the crime and corroborated the victim's testimony as to his injuries. The fact that bodily injury was not charged does not make the picture irrelevant. Injury to a victim is a fact that may be considered in determining whether the assault was committed. (See *People v. Golde* (2008) 163 Cal.App.4th 101, 121-122.)

Moreover, "prosecutors . . . are not obliged to prove their case with evidence solely from live witnesses . . . ." (*People v. Gurule* (2002) 28 Cal.4th 557, 624.) Further one photograph is not cumulative and courts "repeatedly have rejected the argument that victim photographs should have been excluded under Evidence Code section 352 simply because they were cumulative of other evidence. [Citation.]" (*People v. Smithey* (1999) 20 Cal.4th 936, 974.) Nor was it more prejudicial than probative; it showed the results of defendant's act (*People v. Bonilla*, *supra*, 41 Cal.4th at p. 354), and there is no evidence the photo was "unduly bloody or gruesome." (*People v. Roldan* (2005) 35 Cal.4th 646, 713, disapproved on other grounds in *People v. Doolin* (Jan 5, 2009, S054489) __ Cal.4th __ [2009 WL 18142, p. *16, fn. 22].)

2. Griffin Error

The prosecutor made the following statements in closing argument and rebuttal: "You have nothing to contradict the evidence in this case. . . . [¶] . . . [¶] You have no one testify[ing] that someone else did it." "And there was no evidence to contradict [Stanton]." "Defense has the same subpoena power as the prosecution. If they believed that there were witnesses out there that would say that it was someone other than the defendant, they had every ability to bring those people into court . . . ." Counsel objected to the first and last statements.

These did not violate *Griffin v. California* (1965) 380 U.S. 609, 615 [85 S.Ct. 1229, 14 L.Ed.2d 106], which bars a prosecutor from commenting on a defendant's failure to testify. "[A]lthough *Griffin* prohibits reference to a defendant's failure to take the stand in his own defense, that rule 'does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses. [Citations.]' [Citations.]" (*People v. Vargas* (1973) 9 Cal.3d 470, 475.)

The comments did not refer to defendant, to his failure to testify, or to any purported failure by him to deny the act. (*People v. Vargas*, *supra*, 9 Cal.3d at p. 476 [harmless error to argue there was no "denial" by the defendant].) Further, the prosecutor may "fairly comment on the state of the evidence, including a nontestifying defendant's failure to proffer material evidence or witnesses to rebut the People's case. Such comment crosses the *Griffin* line only if the defendant alone could have given such evidence. [Citations.]" (*People v. Bruce G.* (2002) 97 Cal.App.4th 1233, 1244.) And there is nothing in the record to show defendant alone was the only source of contrary evidence. There was testimony there were several other people in the bar.

3. Discharge of Sitting Juror

After all the evidence was presented and over the defendant's objection, after questioning juror No. 2, the court removed her on the ground she was potentially biased. The court observed that as the jury was excused from the courtroom, the juror walked up to a woman identified as defendant's second cousin and greeted her. Upon being questioned by the judge, the cousin stated the juror had said, "I thought that was you." The cousin revealed the juror had been friends with her and her family for many years.

The judge also questioned the juror, who confirmed she had been friends with the cousin's father, having vacationed and had business dealings with him. She had not recognized the woman at first. The juror said she could be fair but knowing the cousin "put[her] in a situation" and she felt "kind of odd."

At any time before a case is submitted to the jury, a juror may be removed for good cause. (§ 1089.) We use a deferential abuse of discretion standard to review that action (*People v. Price* (1991) 1 Cal.4th 324, 400) and uphold the ruling if supported by substantial evidence (*People v. Cleveland* (2001) 25 Cal.4th 466, 474). The juror's lack of certainty that she could deliberate fairly was sufficient evidence of good cause.

4. Removal of Defendant's Family From Courtroom

Upon observing juror No. 2 communicate with defendant's cousin the trial judge removed defendant's family from the courtroom before informing counsel of what had occurred, inquiring of the cousin, and questioning the juror. This did not violate defendant's right to a public trial. Although the inquiry occurred in the courtroom, the judge could have conducted it in chambers where the family members would not have had a right to be present. The exclusion was brief, only for the court to determine what had occurred, and was limited to family members. An unrelated third person was present and allowed to stay. All other portions of the trial were public.

5. CALCRIM No. 875

CALCRIM No. 875 sets out the elements of assault with a deadly weapon. Part of the instruction as read to the jury stated that the prosecution had to prove that "when the defendant acted, he had the ability to apply force *likely to produce great bodily injury* with a deadly weapon to a person." (Italics added.) The italicized portion of the instruction is an option that relates to a charge of assault likely to produce great bodily injury, not assault with a deadly weapon. However, it was not error to include it. Assault with a deadly weapon is not a separate offense from assault likely to produce great bodily injury. (§ 245, subd. (a)(1); *People v. Chaffer* (2003) 111 Cal.App.4th 1037, 1043.) For the same reason no unanimity instruction was required.

6. Denial of Motion to Reduce Conviction to Misdemeanor

After trial defendant moved to reduce his felony conviction for assault with a deadly weapon (§ 245, subd. (a)(1)) to a misdemeanor on the grounds he was young, had no prior felony convictions, there was no serious injury and the conduct was not felonious, the victim did not want to prosecute, his chances at rehabilitation and continuing his employment would be better served, and he had a mental illness.

The prosecution argued defendant engaged in unprovoked violence toward a stranger, who was in pain for two weeks thereafter. In addition, the violence was escalating, defendant having a prior conviction for violence against his father. The court denied the motion after considering all the arguments and in light of the section 17, subdivision (b).

Section 17, subdivision (b) gives the court discretion to reduce a crime to a misdemeanor and absent abuse we must uphold its exercise of that discretion. (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977-978.) The record reveals no such abuse.

7. Court's Duty to Force Defendant to Undergo Evaluation

In accordance with the recommendation of the probation department, the court ordered defendant to a 90-day diagnostic and treatment placement to determine whether he should be placed on probation or sentenced to prison. Subsequently defendant objected to the placement, stating he was wrongly convicted and wanted to be sentenced so he could appeal. His lawyer noted she had conferred with him and supported his decision.

Section 1203.03, subdivision (a) provides that, where a defendant is convicted of a felony, the court may order a temporary placement for diagnosis and treatment for up to 90 days to determine an appropriate sentence. We uphold the court's decision unless it has abused its discretion. Defendant refused this option; nothing required the court to force it upon him.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.